

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

KEVIN RAY HOLMES,

Petitioner,

v.

NEVADA DEPARTMENT OF  
CORRECTIONS, *et al.*,

Respondents.

Case No. 3:21-cv-00364-MMD-WGC

ORDER

This habeas matter is before the Court for initial review under the Rules Governing Section 2254 Cases,<sup>1</sup> as well as consideration of Petitioner Kevin Ray Holmes' motion for appointment of counsel (ECF No. 1-2 ("Motion")). For the reasons discussed below, the Court directs service of the petition, instructs Respondents to respond, and denies Holmes' motion.

Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order a response unless it "plainly appears" that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by procedural defects. *See Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

Holmes is incarcerated pursuant to a conviction and sentence imposed by the Eighth Judicial District Court for Clark County ("state court"). *See State of Nevada v. Kevin Ray Holmes*, Case No. C129708.<sup>2</sup> A jury found Holmes guilty of murder of the first degree

---

<sup>1</sup>All references to a "Habeas Rule" or the "Habeas Rules" in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

<sup>2</sup>The Court takes judicial notice of the online docket records of the Eighth Judicial District

1 with use of a deadly weapon (Count I) and attempt murder with use of a deadly weapon  
2 (Count II). On December 7, 1999, the state district court entered a judgment of conviction  
3 and sentenced Holmes to life with the possibility of parole plus an equal and consecutive  
4 term of life with the possibility of parole for the use of a deadly weapon for Count I as well  
5 as 20 years plus an equal and consecutive 20 years for use of the deadly weapon for  
6 Count II, concurrent to Count I.

7 Holmes discharged his underlying sentence for Count II and he was granted parole  
8 on the underlying sentence for Count I in 2012. Holmes filed a motion to modify or correct  
9 illegal sentence and motion for new trial. The state district court denied his motion and  
10 the Nevada Supreme Court affirmed finding Holmes failed to demonstrate that his  
11 sentence was facially illegal and that his motion for new trial was untimely.

12 In April 2019, Holmes filed a state habeas petition alleging that the Nevada  
13 Department of Corrections ("NDOC") has not been properly crediting Holmes for statutory  
14 good and work time and/or meritorious award credits. The state district court denied his  
15 petition. He appealed and the Nevada Court of Appeals affirmed in part, reversed in part,  
16 and remanded with instructions for the state district court to hold an evidentiary hearing  
17 to determine the correct start date for Holmes' sentence for the attempted murder deadly  
18 weapon enhancement and to determine the correct amount of credit that should apply to  
19 the maximum portion of that sentence.

20 On remand, the state district court conducted a telephonic evidentiary hearing  
21 concluding that Petitioner expired his attempted murder sentence on June 20, 2008, and  
22 the attendant deadly weapon enhancement would begin on June 21, 2008. Holmes then  
23 argued that NDOC is still calculating his sentences incorrectly. In October 2020, the state  
24 district court denied his state habeas petition finding Holmes received the relief as  
25 required by the Nevada Court of Appeals Order. On June 7, 2021, the Nevada Court of  
26 Appeals affirmed the state district court's denial of his state habeas petition.

27  
28 Court and Nevada appellate courts. The docket records may be accessed by the public online  
at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and  
at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1           On August 17, 2021, Holmes initiated this federal habeas corpus proceeding *pro*  
2     *se.* (ECF No. 1.) The Court instructed him to resolve the filing fee, and Holmes timely  
3     complied. (ECF Nos. 3, 4.) Having conducted an initial review, the Court will direct service  
4     of the Petition and a response.

5           Turning to Holmes' Motion, there is no constitutional right to appointed counsel in  
6     a federal habeas corpus proceeding. *See Luna v. Kernan*, 784 F.3d 640, 642 (9th Cir.  
7     2015) (citing *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007)). An indigent petitioner  
8     may request appointed counsel to pursue that relief. *See* 18 U.S.C. § 3006A(a)(2)(B).  
9     The decision to appoint counsel is generally discretionary. *See id.* at § 3006A(a)(2)  
10    (authorizing appointed counsel "when the interests of justice so require"). However,  
11    counsel must be appointed if the complexities of the case are such that denial of counsel  
12    would amount to a denial of due process, and where the petitioner is so uneducated that  
13    he is incapable of fairly presenting his claims. *See LaMere v. Risley*, 827 F.2d 622, 626  
14    (9th Cir. 1987); *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980). But when a  
15    petitioner has a good understanding of the issues and the ability to present his contentions  
16    forcefully and coherently, no attorney is legally required. *See LaMere*, 827 F.2d at 626.

17           The Petition in this case appears sufficiently clear in presenting the issues that  
18    Holmes wishes to raise, and the legal issues are not particularly complex. He has  
19    demonstrated sufficient ability to write and articulate his claims, submitted numerous  
20    filings, and followed the Court's instructions to resolve the filing fee. The Court  
21    appreciates that it is difficult for *pro se* petitioners to pursue their habeas claims and  
22    almost every *pro se* party would benefit from representation by counsel. However,  
23    Holmes has made no showing as to why denial of counsel would amount to a denial of  
24    due process. As such, the Motion is denied.

25           The Clerk of Court is directed to add the Nevada Attorney General Aaron D. Ford  
26    as counsel for Respondents and to provide Respondents an electronic copy of all items  
27    previously filed in this case by regenerating the Notice of Electronic Filing to the Nevada  
28

1 Attorney General's office only. Respondents' counsel must enter a notice of appearance  
2 within 21 days of entry of this order.

3 The Clerk of Court is further directed to file Holmes' petition for writ of habeas  
4 corpus (ECF No. 1-1).

5 It is further ordered that Holmes' motion for appointment of counsel (ECF No. 1-2)  
6 is denied without prejudice.

7 It is further ordered that Respondents will have 60 days from the date the petition  
8 is electronically served to answer or otherwise respond to the petition.

9 It is further ordered that Petitioner will have 60 days following service of the answer  
10 to file and serve a reply brief. If any motion is filed, the parties will brief the motion in  
11 accordance with LR 7-2 and 7-3 of the Local Rules of Practice.

12 It is further ordered that any procedural defenses Respondents raise in this case  
13 must be raised together in a single consolidated motion to dismiss. Procedural defenses  
14 omitted from such motion to dismiss will be subject to potential waiver. Respondents will  
15 not file a response in this case that consolidates their procedural defenses, if any, with  
16 their response on the merits, except pursuant to 28 U.S.C. § 2254(b)(2) as to any  
17 unexhausted claims clearly lacking merit. If Respondents do seek dismissal of  
18 unexhausted claims under § 2254(b)(2), they must do so within the single motion to  
19 dismiss, not in the answer, and specifically direct their argument to the standard for  
20 dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th  
21 Cir. 2005). In short, no procedural defenses, including exhaustion, will be included with  
22 the merits in an answer. All procedural defenses, including exhaustion, instead must be  
23 raised by motion to dismiss.

24 It is further ordered that, in any answer filed on the merits, Respondents must  
25 specifically cite to and address the applicable state court written decision and state court  
26 record materials, if any, regarding each claim within the response as to that claim.

27 It is further ordered that Respondents must file the state court exhibits relevant to  
28 their response to the petition, in chronological order.

1 It is further ordered that all state court records and related exhibits must be filed in  
2 accordance with LR IA 10-3, LR IC 2-2, and LSR 3-3, and include a separate index  
3 identifying each additional exhibit by number or letter. The index must be filed in  
4 CM/ECF's document upload screen as the base document to receive the base docket  
5 number (e.g., ECF No. 10). Each exhibit will then be filed as "attachments" to the base  
6 document—the index—to receive a sequenced sub-docket number (e.g., Exhibit A (ECF  
7 No. 10-1), Exhibit B (ECF No. 10-2), Exhibit C (ECF No. 10-3), and so forth). If the exhibits  
8 will span more than one filing, the base document in each successive filing must be either  
9 a copy of the index or volume cover page. See LR IC 2-2(a)(3)(A).

10 It is further ordered that, notwithstanding LR IC 2-2(g), paper copies of any  
11 electronically filed exhibits—for this case—*need not* be provided to chambers or to the  
12 staff attorney, unless later directed by the court.

13 DATED THIS 6<sup>th</sup> Day of October 2021.

14  
15 

16 MIRANDA M. DU  
17 CHIEF UNITED STATES DISTRICT JUDGE  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28